SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 310

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES OF THE ESTATE OF THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY,

Petitioners,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Court of Claims of the United States has not been officially reported. It appears at pages 73-79 of the record.

II.

Jurisdiction.

1. The date of the judgment sought to be reviewed is May 5, 1941 (R. 81).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

3. The petition for the writ is presented under amended Rule 41 of the Revised Rules of this Court, dated May 25, 1940.

III.

Statement of the Case.

A statement of the case containing all that is material to consideration of the questions presented, with appropriate page references to the record, has been made in the petition for the writ herein and such statement is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Court of Claims erred in holding that petitioners were not entitled to recover the production royalties paid on the developed tracts between the date of sale and the date of approval.

2. The Court of Claims erred in holding that petitioners were not entitled to recover the residue of advance royalties standing to the credit of the Railroad's developed leases on the date it purchased the deposits embraced therein.

3. The Court of Claims erred in holding that petitioners were not entitled to recover the balance of advance royalty standing to the credit of the Railroad's undeveloped leases on the date it purchased the deposits embraced therein.

V.

ARGUMENT.

Summary of the Argument.

Point A. Under the applicable decisions of this Court on the doctrine of relation the petitioners were entitled to

recover the amount of the production royalties paid between the date of the sale and the date of approval.

Point B. The decision of the Court of Claims in denying petitioners the right to recover the amount of the production royalties paid between the date of sale and the date of approval is in conflict with the unreported decision of the United States District Court for the Eastern District of Oklahoma in the case numbered and entitled on its docket, No. 4317 Equity, *Conden National Bank of Coffeyville, Kansas, Trustee, plaintiff*, v. *McAlester-Edwards Coal Co., et al., defendants.*

Point C. The Act of February 8, 1918 (40 Stat. 433), specifically provides that the residue of advance royalties standing to the credit of the Railroad's developed and undeveloped leases on the date it purchased the deposits embraced therein should be credited on the purchase price thereof.

Point A.

Under the applicable decisions of this Court on the doctrine of relation the petitioners were entitled to recover the amount of the production royalties paid between the date of the sale and the date of approval.

The Act of February 8, 1918, gave to the Railroad as lessee the preferential right to purchase the coal deposits embraced in any lease held by it by taking the same at the highest price offered by any responsible bidder at public auction at not less than the appraised value. These developed tracts were sold to the Railroad at public auction on December 11, 1918, and on that date it paid twenty per cent of the purchase price. The deferred payments due in one, two, three and four years, respectively, were paid by the Railroad on or before December 11 in each year. The Act, the regulations and advertisements required that

the Railroad pay twenty per cent of the purchase price on December 11, 1918, and the remainder in four equal annual installments from that date. In addition, the Act, regulations that advertisements authorized and permitted the purchaser to pay the entire purchase price at the time of the sale. It seems apparent from the above that the sale was effective December 11, 1918, and that the Railroad was and is entitled to the production royalties paid by it subsequent to that date.

The deposits were appraised prior to the date of the auction sale and the price which the purchaser bid was based upon the value of the deposits on that date, and not the date of the Secretary's approval. Between the date of the public auction and the date of the Secretary's approval the Railroad paid production royalties in the amount of $35,193.14; and necessarily between those two dates these coal deposits were depleted to the extent of the number of tons of coal represented thereby. No time limit was fixed for the Secretary's approval. In this case the Secretary's approval was not forthcoming until more than eight months after the sale. He could just as well have delayed his approval until the coal deposits were wholly exhausted and their value entirely destroyed.

The doctrine of relation attached to the Secretary's approval and made it operative as of the date the deposits were sold at public auction. The Railroad had the preferential right to purchase these coal deposits, and in order to give effect to this, according to the spirit of the Act of Congress, it must be held that when it fulfilled the conditions imposed upon it, and the sale had been approved, this approval related back to the date of the initiatory step for the acquisition of the deposits. *United States* v. *Anderson*, 194 U. S. 394; *Weyershaeuser* v. *Hoyt*, 219 U. S. 380; *Knapp* v. *Alexander Co.*, 237 U. S. 162; *Lykins* v. *McGrath*,

184 U. S. 169; *Pickering* v. *Lomax*, 145 U. S. 310; *Anchor Oil Co.* v. *Gray*, 256 U. S. 519.

POINT B.

The decision of the Court of Claims in denying petitioners the right to recover the amount of the production royalties paid between the date of sale and the date of approval is in conflict with the unreported decision of the United States District Court for the Eastern District of Oklahoma in the case numbered and entitled on its Docket, No. 4317 Equity, Condon National Bank of Coffeyville, Kansas, Trustee, Plaintiff, v. McAlester-Edwards Coal Co., et al., Defendants.

The above unreported case is the only court decision involving the identical question here presented. In that case the court decreed that under the Act of February 8, 1918 (40 Stat. 433), the purchaser was entitled to have the production royalties paid between the date of sale and the date of approval credited on the purchase price. The special master, in his report therein, stated:

> "By reference to the terms of sale we find that the purchaser was required to pay one-fifth of the amount offered, in cash, and the balance in four equal installments, and this balance was to bear interest from date of purchase. Another significant fact is that these lands were appraised prior to sale. The purchaser must necessarily have bid with the view that he would obtain all the coal underlying these tracts. If the property was not his until seven months after the sale, then the rule would also apply if the approval were held up until fourteen months after the sale, and at the end of fourteen months he would only get the coal remaining after having mined and paid royalty for fourteen months, although the interest on the balance of the purchase price had been running for this fourteen months. Carried to its logical conclusion it is reasonable that the purchaser could at the date of the ap-

proval receive no coal and yet four-fifths of the purchase price would be due. It is my conclusion that the approval of the Secretary of the Interior of the sale of this property to the McAlester-Edwards Coal Company related back to and became effective as of the date of sale of same to McAlester-Edwards Coal Company, and therefore the royalty paid by the McAlester-Edwards Coal Company should be applied to the extinguishment of the debt sued for in this cause of action. (See Pickering *v.* Lomax, et al., 145 U. S. 310, 36 L. Ed. 716-19; Lykins, et al., *v.* Mrs. R. McGrath, 184 U. S. 169, 46 L. Ed. 485; Harris *v.* Bell, 254 U. S. 103, 65 L. Ed. 159.)"

(Pages 40-41 of certified copy of report of Special Master in the case of *Condon National Bank of Coffeyville, Kansas,* v. *McAlester-Edwards Coal Company, et al., supra,* on file with the Clerk of this Court.)

The report of the Special Master in this regard was approved and confirmed by the court. (Pages 1, 2-3 of the certified copy of the Court's decree in the case of *Condon National Bank of Coffeyville, Kansas,* v. *McAlester-Edwards Coal Company, et al., supra,* on file with the Clerk of this Court.)

POINT C.

The Act of Congress of February 8, 1918 (40 Stat. 433) specifically provides that the residue of advance royalties standing to the credit of the Railroad's developed and undeveloped leases on the date it purchased the deposits embraced therein should be credited on the purchase price thereof.

Each lease provided that the advance royalties paid thereon should be a credit on royalty should the Railroad develop and operate a mine or mines on the lands leased and the production of such mine or mines exceeded such sums paid as advanced royalties. These advance royalties were

not in the nature of a penalty, but were required as evidence of good faith on the part of the lessee. Each lease was a separate contract and the advance royalties standing to the credit of one lease could not be credited upon production royalties on any other lease. The Railroad had the right at any time during the term of the leases to produce coal in such quantities that the production royalties thereon would absorb the advance royalties it had theretofore paid. This was a vested right of which it could not be deprived without its consent. These leases had more than ten years to run when the Railroad purchased the coal deposits covered thereby. In recognition of the rights of the lessees to these advance royalties, Congress provided in Section 4 of the Act of February 8, 1918 that they—

> "shall also have the preferential right, except as herein otherwise provided, to purchase the coal deposits embraced in any lease held by such lessee by taking same at the highest price offered by any responsible bidder at public auction at not less than appraised value; and if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate."

This provision of the Act is free of ambiguity and its meaning clear and definite. Having exercised its preferential right to purchase all developed tracts embraced in the leases held by it, the Railroad was entitled to have the residue of advance royalties theretofore paid on one developed lease credited to it on account of production royalties on any of its other developed leases and the amount thereof applied on the purchase price of the latter. The Railroad

having also exercised its preferential right to purchase all undeveloped tracts embraced in the leases held by it, it was entitled to have one-half of the advance royalties thereon credited on the purchase price thereof and the remaining one-half thereof credited to it on account of production on any of its developed leases and the amount thereof applied on the purchase price of the latter.

These were the only means by which the Railroad could become entitled to receive credit for the full amount of the advance royalties on its developed and undeveloped leases. It was the purpose of Congress to promptly dispose of all tribal property belonging to the Choctaws and Chickasaws and bring to an end their tribal relationship. The Act authorized and contemplated the sale of all coal deposits in the segregated mineral area of the two tribes. The Act could not affect existing leases unless and until there was a sale of the deposits embraced therein. Should the lessee purchase his leased tracts he was given definite preferential rights, and should an outsider purchase such tracts definite terms and conditions were imposed upon such purchaser. Had anyone other than the Railroad purchased these leased tracts, or any of them, these advanced royalties could not have been "credited to such lessee on account of any production of coal on any other lease which he may own and operate." In the event anyone other than a lessee purchased a leased tract, the Act provided "that advance royalty paid by any lessee and standing to the credit of said lessee shall be credited by said purchaser to the extent of the amount thereof." This provision of the Act required such purchaser to credit to the lessee the advance royalties standing to the credit of the purchased lease, and that lease only, but it did not require such purchaser to credit the lessee on account of production from the purchased lease with the advance royalties standing to the lessee's credit on some other lease.

In order to receive the credit for the residue of advance royalties on a developed or undeveloped lease, the lessee must of necessity purchase other tracts upon which he held leases. The residue of advance royalties could then be credited to the lessee on account of the production of coal on one of the other leases purchased by him, and in turn, credited on the purchase price on the tract from which the coal was produced.

The decision of the Court of Claims is contrary to the paramount purpose of Congress in enacting this legislation, i. e., the sale of all coal deposits. Under the Court of Claims' interpretation an outsider would not have purchased any of the Railroad's leased tracts for the reason that the Railroad, during the life of its leases, could have applied the entire amount of the advance royalties on all of its leases against the production of coal on any of its leased tracts purchased by such outsider. Nor would the Railroad have purchased its leased tracts for, if it had done so, it would have forfeited all the advance royalty standing to its credit. Such a construction of the Act as the Court of Claims had placed thereon would have effectively prevented the sale of all leased tracts and frustrated the purpose of Congress. (Hearings before the Committee on Indian Affairs of the House of Representatives on H. R. 12544, Part 3, page 65 *et seq.;* Congressional Record, Vol. 56, Part 1, pages 208-212).

The Act is explicit that the rights and interests of the lessees to the advance royalties standing to their credit should be guaranteed and protected. The Indian Tribes were equally protected in their rights. They were assured that their property would bring a full and adequate price; not less than the appraised value at public auction. It was not the purpose of Congress to enrich the tribes at the expense of the lessees.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

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